

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-1134

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1134

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P/S

UNITED STATES OF AMERICA,

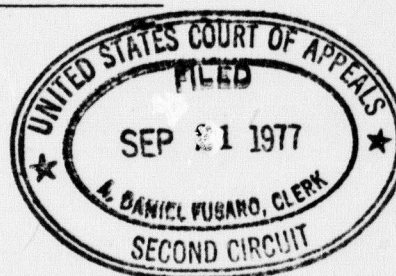
Appellee,

-against-

GEORGE MOSS and AMERICAN
IDENTIFICATION PRODUCTS,

Appellants.

PETITION FOR REHEARING



DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(Of Counsel).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

No. 77-1134

GEORGE MOSS and AMERICAN
IDENTIFICATION PRODUCTS,

Appellants.

-----x

PETITION FOR REHEARING

On September 6, 1977, the judgment of conviction of the defendant was affirmed except to the extent that the United States confessed error. There is, however, a portion of the opinion, which deals with an issue ultimately resolved in our favor, which is of some concern, and provides the basis for this petition for rehearing.

The principal issue in the case was whether prior testimony was improperly used at the trial. Although no objection was taken at trial, prior to the alleged improper use, the panel held that no objection was necessary to preserve the issue. The panel did not invoke the plain error rule. Instead it said (Slip op. 5763-64):

"We think that a waiver in these circumstances requires an intentional relinquishment of a known right by the client rather than by

the lawyer. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fay v. Noia, 372 U.S. 391, 439 (1963). See Schneekloth v. Bustamonte, 412 U.S. 218, 242 (1973). This is not a case where an affirmative timely motion on a 'particular kind of constitutional claim' is required by rule or statute. Davis v. United States, 411 U.S. 233, 239-40 (1973). Cf. Estelle v. Williams, ___ U.S. ___, 96 S.Ct. 1691 (1976). It is a case where the prosecution is required to respect the immunity granted. The constitutional validity of use immunity as distinguished from transactional immunity depends upon a fair adherence to the integrity of the process. Here the Government should at least give notice of its intention to use the bankrupt's testimony and afford a reasonable opportunity to the defendant to consider whether he wishes to waive the constitutional protection he has been granted under compulsion. We are constrained by our reading of Kastigar to reject the Government's claim of waiver based upon ignorance of counsel."

There is, we submit, no precedent for a rule requiring that a defendant personally waive an objection to the admission of evidence at trial. Indeed, only recently the Supreme Court overruled "the sweeping language of Fay v. Noia" which would support such an extraordinary approach in the face of a contemporaneous objection rule. Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497, 2507 (1977). Contrary to the panel opinion, the contemporaneous objection rule is mandated "by rule or statute". Rule 103(a)(1) of the Federal Rules of Evidence, which was affirmatively enacted into law by Congress, expressly provides that:

"(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground as not apparent from the context."

Similarly, F.R.Crim.P., Rule 51, contains a provision which has likewise been construed to require a contemporaneous objection in order to preserve an issue for appeal. Wright, Federal Practice and Procedure, Criminal, § 842. These provisions, of course, have the same force and effect as F.R.Crim.P., Rule 12, which the Supreme Court held, in Davis v. United States, 411 U.S. 233 (1973), took precedence over the knowing and deliberate waiver standard upon which the panel relied here.

Moreover, even in the absence of a "rule or statute" requiring a contemporaneous objection, there would be little basis for the approach adopted by the panel. As Judge Friendly has observed:

"The Constitution protects against compelled self-incrimination; thus an incriminating statement made under compulsion cannot be used over timely objection unless before answering the defendant had waived his privilege not to speak. *** But it is a serious confusion of thought to transpose this doctrine of substantive law into the courtroom. At that stage the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistance of counsel in doing so. There is no need to find a 'waiver' when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled." _/

_/ Friendly, Is Innocence Irrelevant? Collateral Attack On Criminal Judgments, 38 U. Chi. L. Rev. 142, 159 (1970).

Finally, the approach the panel adopts assumes the ultimate issue that would have to be resolved in the face of a contemporaneous objection, i.e., whether the United States was precluded from using the disputed evidence. In other words, if the evidence was properly admissible, and its use did not violate the Self-Incrimination Clause, then there would be no basis whatever for applying the "knowing and deliberate" waiver test which has now been discredited in the present context. The purpose of the contemporaneous objection rule is to flesh that issue out in an orderly way. Here, for example, had a proper objection been made, we believe we may very well have been able to establish that the significant portions of the defendant's prior testimony were false without resorting to his own admissions.

Under these circumstances, we respectfully ask the panel to reconsider its adoption of the Johnson-Fay standard. Had error, in fact, been present here, the Court had the discretion to take note of it under the plain error rule, which permits ample room to correct "a miscarriage of justice" (United States v. Viale, 312 F.2d 595, 601 (C.A. 2, 1963)). Such an approach, which is predicated on considerations of fairness and equity, seems far more preferable, as a matter of policy, to the now discredited test which the panel adopted [United States v. Indiviglio, 352 F.2d 276, 280 and 281, n. 8 (C.A. 2, en banc, 1965), cert. denied, 383 U.S. 907]. Since no

error was found, there is no reason for the panel to reach the issue at all. We, therefore, respectfully ask the panel to reconsider its approach to this problem, and perhaps leave for another day the standards to be resolved in applying the plain error rule in this context.

Dated: September 20, 1977.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of September 1977 she served a copy of the within

PETITION FOR REHEARING

by placing the same in a properly postpaid franked envelope addressed to:

Graham Hughes, Esq.
New York University School of Law
40 Washington Square South
New York, New York 10012

and deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Post Office, 271 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Rita Bloom

Sworn to before me this

20th day of September 19 77.

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979